IN THE SUPREME COURT OF NORTH CAROLINA

No. 49PA93-Property Tax Commission

In the Matter of:
The Appeal of Philip Morris U.S.A. from the decision of the Cabarrus County Board of Equalization and Review for personal property taxes years 1984-1989

FILED
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IN THE OFFICE OF
CLERK SUPREME COURT
OF NORTH CAROLINA

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 108 N.C. App. 514, 424 S.E.2d 222 (1993), affirming a final decision of the North Carolina Property Tax Commission. Heard in the Supreme Court on 13 September 1993.

Parker, Poe, Adams & Bernstein, by Charles C. Meeker; and Blakeney & Alexander, by David L. Terry, for the appellant Cabarrus County.

Hunton & Williams, by William S. Patterson, Jean Gordon Carter, James W. Shea, and David A. Agosto, for the appellee Philip Morris U.S.A.

Robinson Maready Lawing & Comerford, by Michael L. Robinson, on behalf of Durham County, amicus curiae.

James B. Blackburn III, General Counsel, N.C. Association of County Commissioners, and S. Ellis Hankins, General Counsel, N.C. League of Municipalities, amici curiae.

Floyd Allen & Jacobs, by Jack W. Floyd and Robert V. Shaver, Jr., on behalf of Guilford Mills, Inc., amicus curiae.

Poyner & Spruill, by J. Phil Carlton, on behalf of Investment North Carolina, Inc., amicus curiae.

S. Davis Phillips, Secretary of Commerce, on behalf of The North Carolina Economic Development Board, amicus curiae.

Johnson Gamble Mercer Hearn & Vinegar, by Charles H. Mercer, Jr., and M. Blen Gee, Jr.; and Maupin Taylor Ellis & Adams, P.A., by Charles B. Neely, Jr., Nancy S. Rendleman, and Linda F. Nelson, on behalf of North Carolina Citizens for Business and Industry, amicus curaie.

MITCHELL, Justice.

The controlling facts in this case are undisputed. In May of 1988, the Cabarrus County Tax Assessor entered into a contract, denominated "Business Personal Property Audit Agreement," with Tax Management Associates, Inc. ("TMA"). The Cabarrus County Board of Commissioners approved the contract on 16 January 1989. Under the terms of the contract, TMA agreed to provide Cabarrus County with audit services "on a reasonable sample of the County's business personal property taxpayers" in accordance with applicable North Carolina General Statutes, specifically N.C.G.S. §§ 105-283, 105-317.1 and 105-312. The fee arrangement provided for in the contract required Cabarrus County to pay TMA thirty-five percent of taxes owed on property TMA discovered, including any penalties. To "discover" property in this context means to identify taxable property that was not listed for taxation or property that was listed but was substantially undervalued in its listing by the taxpayer. *See* N.C.G.S. § 105-272(6b) (1992).

In November of 1988, TMA contacted Philip Morris U.S.A. to initiate an audit of the tax returns of Philip Morris for the years 1986 and 1987. The audit was later expanded to include Philip Morris' tax returns for all years from 1983 through 1989 and resulted in the "discovery" of a substantial amount of taxable property. Based on the audit and acting pursuant to N.C.G.S. § 105-312, the Cabarrus County Tax Assessor issued a final decision concluding that understatements of tangible personal property on the tax returns of Philip Morris exceeded $100 million per year for each of the years 1984 through 1989 and cumulatively totaled $923,339,510. Philip Morris filed a formal request for a review of the Tax Assessor's final decision by the Cabarrus County Board of Equalization and Review. A hearing was held, and in a decision dated 7 November 1990, the Board ordered an assessment of discovered personal property in the amount of $599,426,934.

Philip Morris then appealed to the North Carolina Property Tax Commission ("Commission"). Philip Morris included among its ground for appeal a contention that the contingent fee contract for private auditing services between Cabarrus County and TMA was against public policy and rendered the discovery of Philip Morris' property void. The Commission, sitting as the State Board of Equalization and Review, heard arguments of counsel and received exhibits on the parties' motions. On 24 May 1991, the Commission rendered its final decision concluding by a 3-2 vote that the contingent fee contract "was void as against public policy from its inception." Therefore, the Commission held that Cabarrus County's discovery and assessment of Philip Morris' property was void "because it resulted directly from the County's entry into a contingent fee contract that was void as against public policy."

Cabarrus County gave notice of appeal to the Court of Appeals. Philip Morris then filed a cross-notice of appeal. The Court of Appeals affirmed the decision of the Com-

mission. On 11 March 1993, this Court allowed Cabarrus County's petition for discretionary review.

Cabarrus County contends that the Court of Appeals erred in concluding that the contingent fee contract for a private tax auditor's service in the present case violates public policy. We agree and, therefore, reverse the decision of the Court of Appeals.

Only a few courts in other jurisdictions have considered the validity of contingent fee contracts for tax audits. The results reached by those courts are completely mixed and establish no clear line of authority. *E.g., Jackson Lumber Co. v. McCrimmon*, 164 F. 759 (N.D. Fla. 1908) (contingent fee arrangement not against public policy); *Sears, Roebuck and Co. v. Parsons*, 260 Ga. 824, 410 S.E.2d 4 (1991) (contingent fee contract violates public policy); *Simpson v. Silver Bow County*, 87 Mont. 83, 285 P. 195 (1930) (contingent fee contract not against public policy); *Murphy v. Swanson*, 50 N.D. 788, 198 N.W. 116 (1924) (contingent fee contract violates public policy). We do not find such authorities from other jurisdictions persuasive or particularly helpful in resolving the issue before us in this case.

The general rule in North Carolina is that absent "constitutional restraint, questions as to public policy are for legislative determination." *State v. Whittle Communications*, 328 N.C. 456, 470, 402 S.E.2d 556, 564, *reh'g denied*, 328 N.C. 735, 404 S.E.2d 878 (1991) (quoting *Gardner v. North Carolina State Bar*, 316 N.C. 285, 293, 341 S.E.2d 517, 522 (1986)). Therefore, we must consider whether the legislature has determined the public policy with regard to the issue before us.

North Carolina General Statute § 105-299 authorizes boards of county commissioners to employ firms to assist county tax assessors. It expressly provides that the "board of county commissioners may employ appraisal firms, mapping firms or other persons or firms having expertise in one or more duties of the assessor to assist him or her

in the performance of such duties." N.C.G.S. § 105-299 (1992). The General Assembly has, therefore, specifically authorized each county to employ private auditors, and we conclude that a power incidental to that grant of authority is the power to decide the basis upon which the private auditors are to be employed. Thus, the statute is the expression of the legislature regarding the public policy on this matter.

Our legislature has specifically prohibited contingent fees in certain settings when it has deemed them to be contrary to the interests of the public. For example, North Carolina law prohibits real estate appraisers giving valuations based on contingent fee arrangements, N.C.G.S. § 93A-80(a)(3), and N.C.G.S. § 120-47.5 outlaws contingent fees for lobbying. Therefore, we conclude that had the General Assembly intended that private tax auditors employed to assist county tax assessors be restricted to an hourly wage or to fixed fee remuneration, it would have expressly said so. Additionally, North Carolina courts have long upheld contingent fee contracts when they are entered into, *inter alia*, in good faith and without undue influence. *See, e.g., High Point Casket Co. v. Wheeler*, 182 N.C. 459, 109 S.E. 378 (1921) (fee of one-third of recovery held not unreasonable); *In re Foreclosure of Cooper*, 81 N.C. App. 27, 344 S.E.2d 27 (1986) (contingent fee contract approved in equitable distribution proceeding).

It is clear that our legislature is well aware of the existence of contingent fee contracts and knows how to forbid then when it wishes to do so, but it has chosen not to place any restriction on such contracts in N.C.G.S. § 105-29. Therefore, we conclude that our legislature has determined that contingent fee contracts for private tax auditor's services are not contrary to public policy. *Cf. Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 627, 319 S.E.2d 217, 221 (1984) (absence of legislative prohibition held to support the validity of insurance contracts covering punitive damages). We express no opinion on the wisdom of

any public policy established by the legislature, of course, as the determination of whether a particular policy is wise or unwise is for determination by the General Assembly. *Martin v. Housing Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970).

For the foregoing reasons, we conclude that the Court of Appeals erred in holding that the contingent fee contract in question here was void as against public policy and in holding that the resulting discovery of taxable property of Philip Morris was null and void. The decision of the Court of Appeals is reversed and this case is remanded to that court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

NORTH CAROLINA COURT OF APPEALS

NO. 9110PTC762

Property Tax Commission
90-PTC-426

In the Matter of:
The Appeal of Philip Morris U.S.A. from the decision of the Cabarrus County Board of Equalization and Review for personal property taxes years 1984-1989

FILED

5 January 1993

APPEAL by Cabarrus County from a Final Decision of the Property Tax Commission entered 24 May 1991. Appeal and cross-appeal by Philip Morris U.S.A. from the same Final Decision. Heard in the Court of Appeals 26 August 1992.

Parker, Poe, Adams & Bernstein, by Charles C. Meeker, for Cabarrus County.

Hunton & Williams, by William S. Patterson, Jean Gordon Carter, James W. Shea, and David A. Agosto, for Philip Morris U.S.A.

James B. Blackburn III and S. Ellis Hankins, on behalf of the North Carolina Association of County Commissioners and the North Carolina League of Municipalities, amici curiae.

Poyner & Spruill, by Wilson Hayman, on behalf of Investment North Carolina, Inc., amicus curiae.

Floyd Allen & Jacobs, by Jack W. Floyd and Robert V. Shaver, Jr., on behalf of Guilford Mills, Inc., amicus curiae.

Johnson Gamble Mercer Hearn & Vinegar, by Charles H. Mercer, Jr. and M. Blen Gee, Jr., and Maupin Taylor Ellis & Adams, P.A., by Charles B. Neely, Jr. and Nancy S. Rendleman, on behalf of North Carolina Citizens for Business and Industry, amicus curiae.

Charles Ewart, Thomas W. Ramseur, Thomas W. Dayvault, and Carroll D. Gray, on behalf of the North Carolina Association of Chamber of Commerce Executive, the Concord-Cabarrus County Chamber of Commerce, the Kannapolis Chamber of Commerce, and the Charlotte Chamber of Commerce, amici curiae.

LEWIS, Judge.

The question posed to us by this appeal appears to be one of first impression in North Carolina. We are asked to determine whether a contingent fee contract between a county tax assessor and a private auditing firm is void as against public policy. We hold that, under the facts of this particular contract, it is, and affirm the Final Decision of the North Carolina Property Tax Commission.

In May 1988, the tax assessor of Cabarrus County entered into a Business Personal Property Audit Agreement ["agreement"] with Tax Management, Associates, Inc. ("TMA"). The Cabarrus County Board of Commissioners accepted the contract on 16 January 1989. TMA agreed to provide Cabarrus County with audit services "on a reasonable sample of the County's business personal property taxpayers," in accordance with applicable North Carolina General Statutes, specifically §§ 105-283, 105-317.1, and 105-312. The fee arrangement set between the parties required Cabarrus County to pay to TMA thirty-five percent of taxes discovered, including penalty. Philip Morris U.S.A.

("Philip Morris") contends such a contract is (1) void as against public policy and (2) unconstitutional.

Philip Morris has a cigarette manufacturing facility in Cabarrus County which has the capacity to produce 83 billion cigarettes a year. The company is the largest taxpayer in Cabarrus County. In November 1988, TMA contacted Philip Morris to initiate an audit of its records.

In December 1989, following an audit of Philip Morris for the years 1983-1989, the Cabarrus County tax assessor proposed discovery for those years in the amount of $1,325,000,000.00 plus penalties. To discover property means to determine property that was not listed or property that was listed but was substantially undervalued in its listing by the taxpayer. *See* N.C.G.S. § 105-273(6b) (1992). On 8 May 1990, the assessor issued his final decision regarding discovery of Philip Morris' personal property. The discovery from this decision included the years 1984-1989, and totaled $923,339,510.00.

Pursuant to N.C.G.S. § 105-312(d) (1992), Philip Morris requested review by the Cabarrus County Board of Equalization and Review. After a hearing, the Board reduced the amount of the discovery to $599,426,934.00. Philip Morris, on 2 January 1991, filed an Application for Hearing before the Property Tax Commission ("Commission"), seeking review of the Board's decision. On 10 May 1991 Philip Morris filed a "Motion to Declare Discovery Null and Void." In both the appeal and the motion, Philip Morris contended that TMA had no legal standing or authority to conduct and audit because the agreement between Cabarrus County and TMA was "void, illegal, illusory and against public policy."

The Final Decision of the Property Tax Commission was entered 24 May 1991. In this 3-2 decision, the Commission concluded that the appeal was properly before it, and that it had the duty to rule upon all issues concerning listing, appraisal, and assessment of property, but not those of

constitutional law. N.C.G.S. § 105-290(b) (1992). The Commission then found that the contract between TMA and Cabarrus County was "void as against public policy from its inception," and therefore adjudged the discovery null and void.

The Commission reasoned that the contingent fee arrangement as set out in the agreement "so offended conventional standards requiring fair, impartial, and uniform treatment of this State's taxpayers that [the contract] could not stand." The Commission concluded:

> The fundamental rule of our system of property taxation is that the tax will be administered in a fair, impartial, and uniform manner, without regard to the identity of the property owner. This principle cannot be followed where a county enters into a contract such as the one presented here.

Cabarrus County appealed. In an effort to preserve its right to appellate review of the issues raised in the decision, Philip Morris filed a cross-notice of appeal to this Court.

The scope of our review of the Property Tax Commission's Final Decision is governed by N.C.G.S. § 105-345.2 (1992). *In re McElwee*, 304 N.C. 68, 73-74, 283 S.E.2d 115, 119 (1981), *appeal after remand*, 75 N.C. App. 658, 331 S.E.2d 265 (1985). The *McElwee* Court held that the provisions found in N.C.G.S. § 105-345.2 and N.C.G.S. § 150A-43 (now 150B) are

> remarkably identical. . . . Subsection (a) provides that the appellate court shall review the record and exception and assignments of error in accordance with the Rules of Appellate Procedure. Subsection (b) provides that the appellate court shall (1) decide all relevant questions of law, (2) interpret constitutional and statutory provisions,

> and (3) determine the meaning and applicability of the terms of any Commission action.
>
> More importantly, with respect to this appeal, G.S. 105-345.2(b) provides that the court may (1) affirm, (2) reverse, (3) declare null and void, (4) remand for further proceedings, or (5) reverse or modify the decision of the Property Tax Commission if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
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> (1) In violation of constitutional provisions; or
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> (2) In excess of statutory authority or jurisdiction of the Commission; or
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> (3) Made upon unlawful proceedings; or
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> (4) Affected by other errors of law; or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.
>
> G.S. 105-345.2(c) provides that the court shall review the whole record and due account shall be taken of the rule of prejudicial error.

Id.

The question is whether the contingent fee arrangement for auditing services violates public policy. Chapter 105 of the North Carolina General Statutes answers neither yea nor nay on this particular issue. Section 299 does, however, allow county boards of commissioners to employ appraisal firms "or other persons or firms having expertise in one or more of the duties of the assessor to assist him or her in the performance of such duties." N.C.G.S. § 105-299 (1992). This provision, however, does not give authority for contingent fee compensation schemes.

We note that contingent fee contracts are prohibited in at least two instances: One, for lobbying fees pursuant to N.C.G.S. § 120-47.5 (1992); and two, for real estate appraisal assignments pursuant to N.C.G.S. § 93A-80(a)(3) (Cum. Supp. 1992). We cannot agree with Cabarrus County that in the absence of a specific bar, the Legislature intended to allow contingent fee auditor contracts. Conversely, we are aware of no instances where the General Statutes permit contingent fee arrangements for State business.

We find no North Carolina case law on point addressing a contingent fee contract for auditing services. There are cases dealing with other types of contingent fee contracts. It is well-settled in North Carolina that contingent fee contracts for representation in a divorce proceeding are void, *Thompson v. Thompson*, 313 N.C. 313, 328 S.E.2d 288 (1985), as are contingent fee contracts for representation for alimony or child support. *Davis v. Taylor*, 81 N.C. App. 42, 344 S.E.2d 19, *disc. rev. denied*, 318 N.C. 414, 349 S.E.2d 593 (1986). On the other hand, contingent fee arrangements in equitable distribution actions are valid so long as they do not compensate the attorney for securing the divorce. *In re Cooper*, 81 N.C. App. 27, 344 S.E.2d 27 (1986). They are almost universally used by counsel in personal injury and wrongful death actions.

Contrary to Cabarrus County's arguments, the cases cited above do not directly guide our decision in the present case. However, one important proposition comes out of them. In a case dealing with attorney contingent fee contracts, this Court stated: "Contracts for contingent fees . . . are closely scrutinized by the courts where there is any question as to their reasonableness." *Harmon v. Pugh*, 38 N.C. App. 438, 444, 248 S.E.2d 421, 424 (1978), *disc. rev. denied*, 296 N.C. 584, 254 S.E.2d 33 (1979). We do so now.

North Carolina's tax policy is grounded in notions of fairness and equity, as mandated by the North Carolina Constitution. N.C. Const. Art. V, § 2 cl. (1) & cl. (2). " 'The principles of equality and uniformity are indispensable to taxation, whether general or local. Local taxation must be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and must be assessed upon all the property according to its just valuation.' " *Hajoca Corp. v. Clayton*, 277 N.C. 560, 569, 178 S.E.2d 481, 487 (1971) (citing Desty on Taxation, Vol 2. p. 1119).

We agree with the Property Tax Commission that the principle of fair, impartial administration of taxation is difficult at best with a contract such as this. Under the terms of the Business Personal Property Audit Agreement, TMA was given the authority to audit "a reasonable sample of the county's business personal property taxpayers." This language appears to give TMA the discretion to choose the sample. Furthermore, the contract compensates TMA at the rate of thirty-five percent of taxes discovered. These two provisions lead to the inescapable conclusion that it would be in TMA's best interest to audit the businesses which own the most property and which conceivably would provide the largest discovery. Clearly, the appearance of potential bias, overreaching, and abuse is substantial.

There is no North Carolina case law on point. In *Sears, Roebuck and Co. v. Parsons*, 260 Ga. 824, 401 S.E.2d 4 (1991), the Georgia Supreme Court examined a contract between a county board of tax assessors and a private auditing company whereby the company was to audit tangible personal property returns as provided by the county's chief assessor. The auditing company was to be paid thirty-five percent of any additional amounts collected as a result of increased valuation as determined by the audit. The board designated Sears, Roebuck and Co. as a taxpayer to be audited under this contract. Sears brought a declaratory judgment action challenging the agreement.

The Georgia Supreme Court held the contract "void as against public policy, not because of the services performed, but because of the contingency scheme of compensation for those services." *Sears*, 401 S.E.2d at 4. The Court reasoned:

> In the exercise of th[e power to tax], the government by necessity acts through its agents. However, this necessity does not require nor authorize the creation of a contractual relationship by which the agent contingently shares in a percentage of the tax collected, and we hold that such an agreement offends public policy. The people's entitlement to fair and impartial tax assessments lies at the heart of our system, and, indeed, was a basic principle upon which this country was founded. Fairness and impartiality are threatened where a private organization has a financial stake in the amount of tax collected as a result of the assessment it recommends.

Id. at 5.

We find *Sears* to be generally on point and the principles applicable here. We believe the present facts to be more egregious to the notion of fair and impartial taxation than in *Sears*, because there the chief assessor determined who would be audited, while here TMA is given the discretion to choose its sample of taxpayers. We are persuaded by the reasoning and holding of *Sears*. While there is no evidence of abuse here, we nevertheless hold that the contingent fee arrangement, which gives TMA a financial stake in the auditing process, gives the appearance of bias and potential abuse and violates public policy.

Philip Morris' cross-appeal argues that the contract and resulting discovery are also violative of its due process and equal protection rights under both the federal and state constitutions. We do not agree. Upon our review of the entire record and the appellant and appellee briefs of

both parties, we conclude that the matters raised and adjudicated in the Commission's Final Decision are not issues of constitutional concern, but are simply issues dealing with the appraisal, listing, or assessment of property. As such, they were properly before the Property Tax Commission, and it is not necessary for us to review the constitutional questions Philip Morris raises in its cross-appeal.

We hold the agreement between Cabarrus County and TMA to be void as against public policy. The Property Tax Commission did not err when it held that the contract itself was null and void as was the discovery that resulted from the contract.

Affirmed.

Chief Judge HEDRICK and Judge WYNN concur.

By Patric P. Wheeler
Deputy Clerk

January 5, 1993

BEFORE THE PROPERTY TAX COMMISSION SITTING AS THE STATE BOARD OF EQUALIZATION AND REVIEW

STATE OF NORTH CAROLINA

COUNTY OF WAKE

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90 PTC 426

FILED MAY 24, 1991

In the matter of:

The appeal of Phillip Morris U.S.A. from the appraisal of certain property by the Cabarrus County Board of Equalization and Review for 1990.

Final Decision

This matter was heard by the Property Tax Commission, sitting as the State Board of Equalization and Review in the City of Raleigh, Wake County, North Carolina on 21 May 1991 pursuant to the appeal of Philip Morris U.S.A. (hereinafter "Taxpayer") from decision of the Cabarrus County Board of Equalization and Review for 1990.

In Paragraph 10 of their Order On Final Pre-hearing Conference (Commission Exhibit 30) filed with the Commission the parties agreed that there were no pending motions, and neither party desired further amendments to the pleadings, except that:

> "the County plans to file motions *in limine* as to (a) evidence on the contentions of Philip Morris U.S.A. with respect to the validity of the contract between Cabarrus County and Tax Management Associates, and (b) evidence concerning a settlement offer made by Philip Morris U.S.A. The taxpayer plans to file motions (a) as to the nullity of the contract between Cabarrus County and Tax Management Associates, (b)

as to the burden of proof, and (c) as to the lack of authority by the County assessor and the Board of Equalization and Review to increase the real property assessment for the years 1989 and 1990. The parties agree that the above motions shall be filed and served no later than 10 May 1991."

As agreed, on 10 May 1991 the Taxpayer filed its "Motion To Declare Discovery Null and Void" and "Motion For An Expedited Decision" (Commission Exhibit 24). Also on 10 May 1991, the County filed its "Motion and Memorandum for ruling on TMA contract issue" (Commission Exhibit 27) and its "Motion and Memorandum On Admissibility of Settlement Negotiations" (Commission Exhibit 28). At the outset of the hearing, the parties asked the Commission to rule on these motions.

After concluding that the matters raised by the Taxpayer in its motions concerning the contract between Tax Management Associates (hereinafter "TMA") and the County were properly before it, the Commission announced the following conclusions of law:

1. The Commission has subject matter jurisdiction to decide all matters, other than constitutional issues, raised by the Taxpayer's and County's motions concerning the contract between TMA and the County, insofar as said contract affects the Taxpayer;

2. Consideration of the contract between TMA and the County for audit services and its effect on the resulting discovery is therefore proper, and the County's motion to exclude the said contract is DENIED.

The Commission then gave the parties an opportunity to offer evidence with regard to the Taxpayer's "Motion To Declare Discovery Null And Void" and "Motion For An Expedited Decision" (Commission Exhibit 24) and the

County's "Motion and Memorandum for ruling on TMA contract issue" (Commission Exhibit 27).

The evidence presented by the Taxpayer and considered by the Commission consisted of the following:

1. Taxpayer Exhibit 1—Business Personal Property Audit Agreement between Cabarrus County and Tax Management Associates, Inc., executed by Terry L. Rowland, Cabarrus County Assessor, on 3 May 1988 and executed by Richard H. Cooke, President of Tax Management Associates, Inc. on 4 May 1988.

The evidence presented by the County and considered by the Commission consisted of the following:

1. County Exhibit 1—Excerpt from the minutes of the Cabarrus County Board of Commissioners (Minute Book 21, pages 11 and 12), approving a budget amendment and accepting the Tax Management Associates, Inc. contract "nunct pro tunct" [sic].
2. County Exhibit 2—Letter from John M. White, Chief Auditor, Tax Management Associates, Inc. to Terry L. Rowland, Cabarrus County Assessor, dated 2 February 1990.
3. County Exhibit 3—Letter from Terry L. Rowland, Cabarrus County Assessor, to James W. Shea, attorney at law, dated 8 May 1990.

COMMISSION EXHIBITS

In addition to the evidence presented by the parties, the Commission also reviewed the following procedural documents:

C-1 Notice of appeal (with attachment), filed 4 December 1990.

C-2 Commission acknowledgement of C-1, 5 December 1990.

C-3 Letter from C. B. McLean, Jr. to David Agosto concerning practice of out-of-state attorneys, 21 December 1990.

C-4 Application For Hearing, filed 3 January 1991.

C-5 *Pro hac vice* Motion, filed 3 January 1991.

C-6 Transmittal letter for C-4 and C-5, filed 3 January 1991.

C-7 Commission acknowledgement of C-4, -5, and -6, 8 January 1991.

C-8 Letter from F. S. Goodrum to James Shea, 25 January 1991.

C-9 Order allowing appearance *pro hac vice*, entered 25 January 1991.

C-10 Letter from C. B. McLean, Jr. to James Shea, 21 February 1991.

C-11 Letter from C. B. McLean, Jr. to James Shea, 4 April 1991.

C-12 Notice of appearance, filed 19 April 1991.

C-13 Transmittal letter for C-12, filed 19 April 1991.

C-14 Motion to compel discovery, filed 22 April 1991.

C-15 Transmittal letter for C-14, filed 22 April 1991.

C-16 Affidavit in opposition to motion to compel discovery, filed 25 April 1991.

C-17 Transmittal letter for C-16, filed 25 April 1991.

C-18 Order compelling discovery in part, entered 1 May 1991.

C-19 Transmittal letter for C-18, 1 May 1991.

C-20 Letter from C. B. McLean, Jr. to David Terry, transmitting subpoena for William Ferris, 7 May 1991.

C-21 Letter from Jean Carter to Commission, transmitting *one* copy of *Taxpayer Exhibit I,* entitled "Asset Listing Setting Forth Acquisition Dates and Detail Costs of All Costs Capitalized For Book (Accounting) Purposes for Each of the Years 1982 through 1988 by Fixed Asset Account Number," filed 10 May 1991.

C-22 Letter from Jean Carter to Commission, transmitting *one* copy of *Taxpayer Exhibit K,* entitled "Asset Listing Setting Forth Each Item of Personal Property Reported by Taxpayer to Cabarrus County in its Personal Property Listings for Each of the Years 1984 through 1989," together with six (6) copies of the Taxpayer's Exhibit Book, filed 10 May 1991.

C-23 Letter from Jean Carter to Commission, transmitting six (6) copies of *Taxpayer Exhibit Z-1,* entitled "Appraisal Report of American Appraisal Associates with respect to Taxpayer's Real Property Located in Cabarrus County," and six (6) copies of *Taxpayer Exhibit Z-2,* entitled "Appraisal Report of American Appraisal Associates with respect to Taxpayer's Personal Property Located in Taxpayer's Cabarrus County Cigarette Manufacturing Facility," filed 10 May 1991.

C-24 "Motion To Declare Discovery Null And Void" and "Motion For An Expedited Decision," filed 10 May 1991.

C-25 Memorandum in Support of "Motion To Declare Discovery Null And Void" and "Motion For An Expedited Decision," filed 10 May 1991.

C-26 Affidavit of Fletcher Hartsell, filed 10 May 1991.

C-27 Cabarrus County's Motion and Memorandum For Ruling on TMA Contract Issue, filed 10 May 1991.

C-28 Cabarrus County's Motion and Memorandum On Admissibility of Settlement Negotiations, filed 10 May 1991.

C-29 Letter from Ms. Arrowwood to Commission, transmitting C-26, -27, and -28, filed 10 May 1991.

C-30 Order On Final Pre-hearing Conference, executed by counsel for the parties, filed 9 May 1991.

C-31 Transmittal letter for C-30, filed 9 May 1991.

C-32 Letter from Mr. Meeker to Commission, requesting subpoena for James F. Wagner, 13 May 1991.

C-33 Subpoena and acknowledgement of service, dated 14 May 1991.

C-34 & C-35 Letters from Mr. Goodrum to the parties, 15 May 1991.

C-36 Hearing Memorandum of Cabarrus County, filed 16 May 1991.

C-37 Transmittal letter for C-36, filed 16 May 1991.

C-38 Transmittal letter for supplemental exhibits filed by Cabarrus County and exhibits A, B, and C to Cabarrus County Exhibit 22, filed 17 May 1991.

C-39 Transmittal letter for Taxpayer Exhibit AA, together with revised Exhibit B and Exhibit D to Pre-hearing Order, filed 17 May 1991.

C-40 Cabarrus County's response to Taxpayer's motion, filed 20 May 1991.

C-41 Hearing Memorandum of Taxpayer, filed 20 May 1991.

FINDINGS OF FACT

After carefully considering the arguments of counsel and the evidence presented by the parties, as listed above, the Commission makes the following Findings of Fact:

1. Taxpayer Exhibit 1 is a contract between TMA and Cabarrus County for audit services.

2. Taxpayer Exhibit 1 was executed by Terry L. Rowland, in his capacity as Cabarrus County Assessor, on or about 3 May 1988.

3. The Cabarrus County Board of Commissioners, in January 1989, "accepted the Tax Management Associates, Inc. contract nunct pro tunct," [sic] as reflected in County Exhibit 1.

4. Taxpayer Exhibit 1 contains the following provisions:

   1. *Services*

   In accordance with the charges, terms, and conditions contained in this agreement, TMA agrees to furnish NCGS (North Carolina General Statutes) audit services on a reasonable sample of the county's business personal property taxpayers. Audits will be performed in compliance with all statutes applicable within the N.C. Machinery Act, specifically: NCGS 105-283, Uniform Appraisal Standards,; NCGS 105-317.1, Appraisal Elements For Reconciling To True Value; and NCGS 105-312, "Discovered Property" Procedures. Customer shall pay all charges due under the schedules in effect.

   2. *Term of Agreement*

   This agreement shall become effective from the date of its acceptance by TMA and shall remain in effect for an initial term of thirty six (36) months and shall continue in effect thereafter on a month-

to-month basis cancellable by either party upon thirty (30) days written notice.

3. *Charges*

For services furnished by TMA under this agreement, customer shall pay to TMA

A. Schedule: 35% of taxes discovered including penalty.

B. Time: 25%—After notice of discovery to taxpayer.
25%—After local appeal right is exhausted.
50%—At time of payment from taxpayer or by last day taxpayer can pay bill without interest, whichever occurs first.

All invoices shall be due and payable in full upon receipt. All amounts not paid within thirty (30) days after date of invoice are subject to a finance charge on the unpaid amount at the rate of one and one-half percent (1-1/2%) per month (annual percentage rate eighteen percent (18%)).

4. *Indemnification*

Customer agrees that proprietary rights to the business personal property audit system shall remain with TMA and that customer will not sell or lease the system to any other person, Company, or taxing jurisdiction or permit access to the system except for employees of the customer authorized to do so by TMA.

5. *General*

The agreement will be governed by the laws of the State of North Carolina.

The customer acknowledges that he has read this

agreement, understands it, and agrees to be bound by its terms and conditions.

6. *Notices*

Notices to be given or submitted by either party to the other, pursuant to this agreement, shall be sufficiently given or made in writing and sent by certified mail, postage prepaid.

5. The discovery by the County conducted against the Taxpayer was a direct result of the County's entry into the agreement with TMA.

CONCLUSIONS OF LAW

Based on its Findings of Fact, as set forth above, the Commission makes the following Conclusions of Law:

1. The Property Tax Commission, sitting as the State Board of Equalization and Review, has the authority to hear and decide appeals concerning the appraisal of the property of public service companies (as defined in G.S. 105-333) and to act as a State board of equalization and review for the valuation and taxation of property in this State, as provided for in G.S. 105-290; see G.S. 143B-222.

2. In its capacity as the State board of equalization and review under G.S. 105-290(a), the Commission is required to hear and adjudicate appeals from boards of county commissioners and from county boards of equalization and review as provided in G.S. 105-290. Under G.S. 105-290(b), the Commission is required to ". . . hear and decide appeals from decisions concerning the listing, appraisal, or assessment of property made by county boards of equalization and review and boards of county commissioners."

3. The Taxpayer made a timely appeal to the Commission from a decision of the Cabarrus County Board of Equalization and Review for 1990. The decision of the said board concerned the listing, appraisal, or assessment of property, and was, under G.S. 105-290, appealable to the Commission.

4. The Commission rejects the County's argument that the contract between TMA and the County is entirely beyond the Commission's subject matter jurisdiction. The Commission concludes as a matter of law that, as the State board of equalization and review, this Commission has not only the authority, but the *duty* to rule upon all issues concerning the listing, appraisal, and assessment of property, except those of constitutional law, properly raised by parties to appeals before it. This includes questions such as the one presented here. The Commission's duty to make such rulings has been recognized by our appellate courts; *see In re McElwee,* 304 N.C. 68, 85, 283 S.E.2d 115, 126 (1981); *see also King v. Baldwin,* 276 N.C. 316, 172 S.E.2d 12 (1970); *see generally Johnston v. Gaston County,* 71 N.C. App. 707, 323 S.E.2d 381 (1984), cert. denied 313 N.C. 508, 329 S.E.2d 392 (1985). In *McElwee,* the Court noted that the "[f]ailure of the Property Tax Commission to recognize the arbitrary and capricious approach taken by the county in this instance was, in itself, arbitrary . . . ." It would be arbitrary for the Property Tax Commission to fail to address the public policy issues regarding the fair, impartial, and uniform listing, appraisal, or assessment of property raised by the Taxpayer in this case.

5. The Commission concludes as a matter of law that the contract between TMA and the County was void as against public policy from its inception because its terms, particularly those contained in paragraph 3, "Charges", so offended conventional

standards requiring fair, impartial, and uniform treatment of this State's taxpayers that it could not stand. The fundamental rule of our system of property taxation is that the tax will be administered in a fair, impartial, and uniform manner, without regard to the identity of the property owed. This principle cannot be followed where a county enters into a contract such as the one presented here. The most recent case involving individuals or organizations having a financial interest in the assessment of property tax or the amount collected is *Sears, Roebuck and Co. v. Parsons,* Case No. S90A1678, decided 21 February 1991. In that case, the Georgia Supreme Court stated "[t]he people's entitlement to fair and impartial tax assessments lies at the heart of our system, and, indeed, was a basic principle upon which this country was founded. Fairness and impartiality are threatened where a private organization has a financial stake in the amount of tax collected as a result of the assessment it recommends."

6. The Commission concludes that the County's attempt to "discover" the Taxpayer's property under the provisions of G.S. 105-312 was void because it resulted directly from the County's entry into a contract that was void as against public policy. The Commission notes that the County is not precluded from initiating a proper discovery under North Carolina General Statute 105-312 with regard to any tax years still within the reach of that statute.

Our system of taxation and collection in this State as well as throughout the nation is based on a program of voluntary compliance. This Commission agrees with the premise that the audit of property tax returns is essential to the enforcement of our voluntary assessment system. However, any voluntary tax compliance system to properly

work must be based on fairness, impartiality and uniformity.

While this decision is based solely upon the examination by the Commission of the facts before it, and does not purport to speak to the public policy aspects of any contract not before it, it is the opinion of the Commission that sound tax policy is not served where individuals or organizations have a financial interest in the assessment of property tax or the amount collected. The implementation of such an enforcement program can only lead to abuses in the enforcement system or at the very least, the appearance to the public of such abuses.

If the essential elements of fairness, impartiality and uniformity are lost in the assessment and collection of property taxes, the underpinning of a voluntary tax system will be weakened and all the people of North Carolina will suffer. While the Commission recognizes that this decision may cause concern among those counties that utilize the services of firms such as was involved in this case, the implementation and administration of a uniform fair and impartial tax assessment and collection system is of paramount importance to the well being of all of the citizens of the State of North Carolina. Public policy must establish and protect such a system and in this case we believe the policy was violated by a system or procedure that invites abuse by private auditors and distrust by taxpayers.

Having decided the case on the basis of public policy, the Commission does not reach the remaining issues raised by the Taxpayer's and the County's motions.

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED THAT the "discovery" of the Taxpayer's property conducted by Cabarrus County is null and void; the County is instructed to revise its tax records as may be necessary to reflect the findings and conclusions of the Commission set forth herein.

Entered this the 24th day of May, 1991.

NORTH CAROLINA PROPERTY TAX COMMISSION

/s/ William P. Pinna
William P. Pinna, Chairman

Commission Member Clarence E. Leatherman and Member John A. Cocklereece, Jr. respectfully dissent from this decision.

Attest:

/s/ Frank S. Goodrum
Frank S. Goodrum, Secretary

Commission Member John A. Cocklereece, Jr. dissenting:

I agree that the contingent fee contract is properly before the Commission. I agree that the Commission has jurisdiction to determine the issue of whether this contract in particular, or another arrangement, contravenes public policy. I respectfully dissent, however, in the Commission's conclusion that the contingent fee arrangement in issue here is, and similar arrangements, because of a contingent payment scheme, may be, void as against public policy.

Whether an arrangement contravenes public policy is not a black and white question. By definition, public policy questions involve a balancing of interests for and against a particular position. In this case the taxpayer argues that contingent fee contracts between counties and auditors contravene public policy because, among other things, they discourage *bona fide* settlement negotiations, and fairness and impartiality in tax administration are threatened. The County argues that such contracts do not contravene public policy because, among other things, the assessor, not the contingent fee auditor, makes the assessment and negotiates settlements, and such contracts are an efficient means of correctly assessing taxpayers in days of constrained budgets. Having balanced the parties respective interests, I do not believe the contingent fee contract in issue here is void as against public policy. Nor do I believe that any similar arrangement, because of its contingent fee payment scheme, is void as against public policy.

While I sympathize with the Taxpayer's arguments as to the dangers of contingent fee contracts, I believe their arguments are best addressed to the legislature, which may establish as a matter of law that contingent fee contracts contravene public policy.

Commission Member Clarence E. Leatherman joins in this dissent.

Decision of the Board of Equalization and Review for Cabarrus County

CABARRUS COUNTY
Post Office Box 707
Concord, North Carolina 28026-0707

November 7, 1990

Mr. James W. Shea
Hunton & Williams
100 Park Avenue
New York, New York 10017

Re: Philip Morris U.S.A.—Property Tax Appeal
Board of Equalization and Review

Dear Mr. Shea:

The Board of Equalization and Review for Cabarrus County reviewed your appeal regarding the proposed discovery of Philip Morris U.S.A. on November 6, 1990.

A motion was made, seconded, and unanimously approved that the proposed discovery of Philip Morris U.S.A. in the amount of $923,339,510 be reduced to $599,426,934.

This adjustment represents, for tax years 1984 through 1989, a total personal property value of $548,499,052, and for tax years 1989 and 1990, a total real property value of $50,927,882.

A ten percent (10%) across the board late listing penalty was recommended and approved for the personal property assessment only.

I have enclosed computations of taxes and penalty resulting in this decision. Also enclosed is computations of the personal property assessment (with and without capitalized interest). Capitalized interest in the amount of $246,284,520 was *excluded* in this assessment.

The real property assessment ($25,463,941 each year) represents HVAC and approximately twenty percent (20%) of the steam, distributed through the Central Power Plant,

for people comfort. This was reclassified as real property and *includes* a capitalized interest value of $5,019,591.

After review of the enclosed material, please advise this office if you desire additional information to explain in greater detail the specifics of the Board of Equalization and Review's decision. If a conference is desired, we will honor that request.

You may within thirty (30) days from the date of this notice file a written notice of appeal and a written statement of the grounds of appeal with the Clerk of the Board of County Commissioners, P.O. Box 707, Concord, N.C. 28026-0707 and with the North Carolina Property Tax Commission, P.O. Box 25000, Raleigh, N.C. 27640.

Sincerely,

Cabarrus County Board of
Equalization and Review

/s/ Terry L. Rowland
Terry L. Rowland
Secretary

Enclosures

Taxes and penalty resulting in 1990 Board of Equalization and Review decision for Philip Morris, U.S.A.

Personal Property

Tax Year	Valuation	Tax Rate	Tax	Penalty	Total Tax
1989	54,178,381	$ .63	$ 341,324.	$ 34,132.	$ 375,456.
1988	78,477,415	.595	466,941.	46,694.	513,635.
1987	91,646,172	.54	494,889.	49,489.	544,378.
1986	100,036,145	.52	520,188.	52,019.	572,207.
1985	108,250,437	.52	562,902.	56,290.	619,192.
1984	115,910,503		602,735.	60,274.	663,009.
	548,499,052		$2,988,979.	$298,898.	$3,287,877.

Real Property

1990	25,463,941	.63	160,423.	—	$ 160,423.
1989	25,463,941	.63	160,423.	—	160,423.
	50,927,882		$320,846.		$320,846.
	599,426,934		$3,309,825.	$298,898.	$3,608,723.

[Accompanying Schedules Omitted]

Final Decision of Respondent's Assessor

CABARRUS COUNTY
Post Office Box 707
Concord, North Carolina 28026-0707

May 8, 1990

Mr. James W. Shea
Hunton & Williams
100 Park Avenue
New York, New York 10017

RE: Philip Morris U.S.A.
Cabarrus County Property Taxes

Dear Mr. Shea:

In accordance with the provisions of North Carolina General Statute 105-312, this is to advise you of the final decision regarding the discovery of property subject to ad valorem taxation in Cabarrus County as described in our notice to you dated December 20, 1989.
A summary of events that have taken place covering this matter is as follows:

December 20, 1989—Letter from Terry L. Rowland, Cabarrus County Assessor, to James W. Shea, Hunton & Williams, Attorneys, legal counsel for Philip Morris, Inc., which constitutes the notice of proposed discovery as provided by North Carolina General Statute 105-312 (d).

January 12, 1990—Letter from James W. Shea to Terry L. Rowland representing a written exception to the proposed discovery in compliance with the provisions of General Statute 105-312 (d)(4).

February 19, 1990—Meeting of the Cabarrus County Board of Commissioners in executive session with Mr. Newton O. Fowler for the purposes of discussion of issues in this matter.

March 7, 1990—Letter from Fletcher L. Hartsell, Jr., Hartsell, Hartsell & Mills, Attorneys, Cabarrus County attorney, to James W. Shea in response to letter to Terry L. Rowland dated January 12, 1990 and Newton Fowler's meeting with the Board of Commissioners of February 19, 1990.

March 21, 1990—Letter from Fletcher L. Hartsell, Jr. to James W. Shea confirming recent discussions, enclosing preliminary audit report from Tax Management Associates and confirming conference scheduled for March 27, 1990 to discuss issues in this matter.

March 27, 1990—Conference with Philip Morris, Inc. representatives, County Assessor, County Manager, consultants, and attorneys representing both parties, for the purpose of presenting evidence or argument regarding the proposed discovery.

April 30, 1990—Letter from William R. McGee, taxpayer consultant, to Mr. John M. White, county consultant, regarding an analysis of Real versus Personal Property which is an issue in this matter.

In addition to the above specified events, there has been a number of telephone conversations and informal discussions that have taken place in regard to the proposed discovery. As a result of all the information which has been submitted and reviewed by both parties, adjustments have been made to amend the proposed discovery as follows:

Tax Year	*Amount	Penalty
1989	$102,544,283	10%
1988	130,267,023	20%
1987	149,470,200	30%
1986	164,730,865	40%
1985	183,322,490	50%
1984	193,004,649	60%

*See Schedule "D" and attached schedules for details.

This revised notice of discovery is being furnished to you in compliance with the provisions of General Statute 105-312 (d). If you desire to take exception to this revised discovery, you must make a written request for review of the Assessor's decision by the Cabarrus County Board of Equalization and Review within fifteen (15) days from the date of this notice. Written request must be directed to the County Assessor as provided by General Statute 105-312 (d).

Cabarrus County continues to recognize a legal and moral obligation to be fair and equitable to all its citizens and through the appeals process, the Cabarrus County taxing officials will continue to work with Philip Morris and its representative in any way possible to bring about a fair and equitable conclusion. We remain prepared to meet with a desire to resolve this matter if possible at any time within the next fifteen days.

Sincerely yours,

/s/ Terry L. Rowland
Terry L. Rowland
Assessor

[Accompanying Schedules Omitted]

Proposed Discovery of Respondent's Assessor

CABARRUS COUNTY
Post Office Box 707
Concord, North Carolina 28026-0707

December 20, 1989

Mr. James W. Shea
Hunton & Williams
100 Park Avenue
New York, New York 10017

Dear Mr. Shea:

Thank you and other Philip Morris, Inc. representatives for meeting with our auditors, Tax Management Associates, Inc. (TMA) and Cabarrus County on December 18 and 19, 1989. We feel the support documentation we requested, and you provided, along with the technical discussion concerning this information, has defined for all parties the resulting discrepancies.

As you are well aware of, the most critical issue is the difference of opinion as to whether the property in question is real or personal property as defined in the North Carolina General Statues. For reasons explained in our meetings, our opinion remains that the subject property is personal property and is administered in a likewise fashion throughout the State of North Carolina. We have received favorable comments on our position from the North Carolina Department of Revenue (Ad Valorem Tax Section), and welcome you to contact their personnel if you so desire.

TMA has indicated to this county that you have provided most of the documentation necessary to complete this audit, and we certainly appreciate your cooperation, time, and effort. I understand you may summit a more detailed account (line item) for expenses incurred for machinery, equipment, and possibly construction in progress. This additional information would be annalized for the purpose of classifying this property as real or personal.

According to the information we have received to date, and pursuant to North Carolina G.S. 105-312, we propose to make the following discovery:

Tax Year	M&E-F&F	CIP	Penalty
1989	$175,000,000	$25,000,000	10%
1988	175,000,000	25,000,000	20%
1987	175,000,000	25,000,000	30%
1986	175,000,000	25,000,000	40%
1985	175,000,000	25,000,000	50%
1984	175,000,000	25,000,000	60%
1983	100,000,000	25,000,000	60%

Enclosed are copies of Business Personal Property returns relating to the above discovery.

These values and penalties will become final unless we receive written exception thereto within thirty (30) days from the date of this letter.

Sincerely,

/s/ Terry L. Rowland
Terry L. Rowland

SUPREME COURT OF NORTH CAROLINA
CHRISTIE SPEIR CAMERON, Clerk
Justice Building, 2 E. Morgan Street
Raleigh, N.C. 27601
(919) 733-3723

23 December 1993

Mr. William S. Patterson
Attorney at Law
Hunton & Williams
One Hanover Square
Suite 1400
Raleigh, NC 27602

Re: The Appeal of Phillip Morris
No. 49PA93

Dear Mr. Patterson:

Motion by Philip Morris to Alter, Amend, or Modify Opinion filed on December 3, 1993; to Shorten Cabarrus County's Time to Respond to this Motion; and for an Expedited Decision has been filed and the following order entered:

"Motion Denied by order of the Court in conference this the 22nd day of December 1993.

s/ Parker, J.
For the Court"

Very truly yours,

Christie Speir Cameron
Clerk of Supreme Court

/s/ Peggy N. Byrd
Peggy N. Byrd
Assistant Clerk

NORTH CAROLINA COURT OF APPEALS

NO: 93PTC496M-PC
County: PROP. TAX COMM.
Number: 90-PTC-426

FILED 10 JANUARY 1994

ORDER

The following Order was entered:

"The petition and motion filed in this cause on the 23rd dat [sic] if [sic] December, 1993 and designated "Philip Morris U.S.A.'s Motion Under Appellate Rule 2 to Suspend or Vary the Rules, or, Alternatively, Philip Morris U.S.A.'s Petition for Writ of Certiorari Under Appellate Rule 21" are Denied.

By order of the Court this 7th day of January, 1994."

The above order is therefore certified to the North Carolina Property Tax Commission.

Witness my hand and official seal this the 10th day of January, 1994.

/s/ John H. Connell
Clerk of the Court of Appeals

SUPREME COURT OF NORTH CAROLINA
TENTH DISTRICT

No. 49PA93

From NC Court of Appeals
(9110PTC762)
From Property Tax Commission
(90PTC426)

In the Matter of:
The Appeal of Philip Morris U.S.A. from the decision of the Cabarrus County Board of Equalization and Review for personal property taxes years 1984-1989

(appealed by Cabarrus County)
FILED FEBRUARY 3, 1994
ORDER

Upon consideration of the petition filed by Philip Morris in this matter for rehearing of the decision of this Court pursuant to Rule 31, N.C. Rules of Appellate Procedure, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 27th day of January 1994.

/s Parker, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of February 1994.

Christie Spair Cameron
Clerk, Supreme Court of North Carolina
/s/ Peggy N. Byrd
Peggy N. Byrd
Assistant Clerk

GENERAL STATUTES OF NORTH CAROLINA

Excerpts from
Chapter 105

Taxation

NOVEMBER 1992

§ 105-273. Definitions.

When used in this Subchapter (unless the context requires a different meaning):

* * *

(6a) "Discovered property" includes all of the following:

a. Property that was not listed during a listing period.

b. Property that was listed but the listing included a substantial understatement.

c. Property that has been granted an exemption or exclusion and does not qualify for the exemption or exclusion.

(6b) "To discover property" means to determine any of the following:

a. Property has not been listed during a listing period.

b. A taxpayer made a substantial understatement of listed property.

c. Property was granted an exemption or exclusion and the property does not qualify for an exemption or exclusion.

* * * *

§ 105-283. Uniform appraisal standards.

All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used. For the purposes of this section, the acquisition of an interest in land by an entity having the power of eminent domain with respect to the interest acquired shall not be considered competent evidence of the true value in money of comparable land.

* * * *

§ 105-296. Powers and duties of assessor.

(a) The county assessor shall have general charge of the listing, appraisal, and assessment of all property in the county in accordance with the provisions of law. He shall perform the duties imposed upon him by law, and he shall have and exercise all powers reasonably necessary in the performance of his duties not inconsistent with the Constitution or the laws of this State.

(b) Within budgeted appropriations, he shall employ listers, appraisers, and clerical assistants necessary to carry out the listing, appraisal, assessing, and billing functions required by law. The assessor may allocate responsibility among such employees by territory, by subject matter, or

on any other reasonable basis. Each person employed by the assessor as a real property appraiser or personal property appraiser shall during the first year of employment and at least every other year thereafter attend a course of instruction in his area of work. At the end of the first year of their employment, such persons shall also achieve a passing score on a comprehensive examination in property tax administration conducted by the Department of Revenue.

* * *

(g) He shall have power to subpoena any person for examination under oath and to subpoena documents whenever he has reasonable grounds for the belief that such person has knowledge or that such documents contain information that is pertinent to the discovery or valuation of any property subject to taxation in the county or that is necessary for compliance with the requirements as to what the tax list shall contain. The subpoena shall be signed by the chairman of the board of equalization and review if that board is in session; otherwise, it shall be signed by the chairman of the board of county commissioners. It shall be served by an officer qualified to serve subpoenas. Any person who shall wilfully fail or refuse to appear, produce subpoenaed documents, or testify concerning the subject of the inquiry shall be guilty of a misdemeanor and fined and/or imprisoned in the discretion of the court.

(h) Only after the abstract has been carefully reviewed can the assessor require any person operating a business enterprise in the county to submit a detailed inventory, statement of assets and liabilities, or other similar information pertinent to the discovery or appraisal of property taxable in the county. Inventories, statements of assets and liabilities, or other information secured by the assessor under the terms of this subsection, but not expressly required by this Subchapter to be shown on the abstract itself, shall not be open to public inspection but shall be

made available, upon request, to representatives of the Department of Revenue or of the Employment Security Commission. Any assessor or other official or employee disclosing information so obtained, except as may be necessary in listing or appraising property in the performance of official duties, or in the administrative or judicial proceedings relating to listing, appraising, or other official duties, shall be guilty of a misdemeanor and punishable by a fine not exceeding fifty dollars ($50.00).

* * * *

§ 105-299. Employment of experts.

The board of county commissioners may employ appraisal firms, mapping firms or other persons or firms having expertise in one or more of the duties of the assessor to assist him or her in the performance of such duties. The county may make available to such persons any information it has that will facilitate the performance of a contract entered into pursuant to this section. Persons receiving such information shall be subject to the provisions of G.S. 105-289(e) and G.S. 105-259 regarding the use and disclosure of information provided to them by the county. Any person employed by an appraisal firm whose duties include the appraisal of property for the county shall be required to demonstrate that he or she is qualified to carry out such duties by achieving a passing grade on a comprehensive examination in the appraisal of property administered by the Department of Revenue. In the employment of such firms, primary consideration shall be given to the firms registered with the Department of Revenue pursuant to the provisions of G.S. 105-289(i). A copy of the specifications to be submitted to potential bidders and a copy of the proposed contract may be sent by the board to the Department of Revenue for review before the invitation or acceptance of any bids. Contracts for the employment of such firms or persons shall be deemed to be contracts for personal services and shall not be subject

to the provisions of Article 8, Chapter 143, of the General Statutes.

* * * *

§ 105-312. (Effective until January 1, 1993) Discovered property; appraisal; penalty.

* * *

(b) Duty to Discover and Assess Unlisted Property.—It shall be the duty of the assessor to see that all property not properly listed during the regular listing period be listed, assessed and taxed as provided in this Subchapter. The assessor shall file reports of such discoveries with the board of commissioners in such manner as the board may require.

* * *

(d) Procedure for Listing, Appraising, and Assessing Discovered Property.—Subject to the provisions of subsection (c), above, and the presumptions established by subsection (f), below, discovered property shall be listed by the assessor in the name of the person required by G.S. 105-302 or G.S. 105-306. The discovery shall be deemed to be made on the date that the abstract is made or corrected pursuant to subsection (e) of this section. The assessor shall also make a tentative appraisal of the discovered property in accodance with the best information available to him.

When a discovery is made, the assessor shall mail a notice to the person in whose name the discovered property has been listed. The notice shall contain the following information:

(1) The name and address of the person in whose name the property is listed;

(2) A brief description of the property;

(3) A tentative appraisal of the property;

(4) A statement to the effect that the listing and appraisal will become final unless written exception thereto is filed with the assessor within 30 days from date of the notice.

Upon receipt of a timely exception to the notice of discovery, the assessor shall arrange a conference with the taxpayer to afford him the opportunity to present any evidence or argument he may have regarding the discovery. Within 15 days after the conference, the assessor shall give written notice to the taxpayer of his final decision. Written notice shall not be required, however, if the taxpayer signs an agreement accepting the listing and appraisal. In cases in which agreement is not reached, the taxpayer shall have 15 days from the date of the notice to request review of the decision of the assessor by the board of equalization and review or, if that board is not in session, by the board of commissioners. Unless the request for review by the county board is given at the conference, it shall be made in writing to the assessor. Upon receipt of a timely request for review, the provisions of G.S. 105-322 or G.S. 105-325, as appropriate, shall be followed.

* * *

(g) Taxation of Discovered Property.—When property is discovered, it shall be taxed for the year in which discovered and for any of the preceding five years during which it escaped taxation in accordance with the assessed value it should have been assigned in each of the years for which it is to be taxed and the rate of tax imposed in each such year. The penalties prescribed by subsections (h) and (h1) of this section shall be computed and imposed regardless of the name in which the discovered property is listed. If the discovery is based upon an understatement of value, quantity, or other measurement rather than an omission from the tax list, the tax shall be computed on the ad-

ditional valuation fixed upon the property, and the penalties prescribed by subsections (h) and (h1) of this section shall be computed on the basis of the additional tax.

* * * *

§ 105-312. (Effective January 1, 1993) Discovered property; appraisal; penalty.

* * *

(b) Duty to Discover and Assess Unlisted t shall be the duty of the assessor to see that all property not properly listed during the regular listing period be listed, assessed and taxed as provided in this Subchapter. The assessor shall file reports of such discoveries with the board of commissioners in such manner as the board may require.

* * *

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(1) The name and address of the person in whose name the property is listed;

(2) A brief description of the property;

(3) A tentative appraisal of the property;

(4) A statement to the effect that the listing and appraisal will become final unless written exception thereto is filed with the assessor within 30 days from date of the notice.

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* * *

(g) Taxation of Discovered Property.—When property is discovered, it shall be taxed for the year in which discovered and for any of the preceding five years during which it escaped taxation in accordance with the assessed value it should have been assigned in each of the years for which it is to be taxed and the rate of tax imposed in each such year. The penalties prescribed by subsection (h) of this section shall be computed and imposed regardless of the name in which the discovered property is listed. If the discovery is based upon an understatement of value, quantity, or other measurement rather than an omission from

the tax list, the tax shall be computed on the additional valuation fixed upon the property, and the penalties prescribed by subsection (h) of this section shall be computed on the basis of the additional tax.

* * * *

§ 105-322. County board of equalization and review.

* * *

(g)(1) Powers and Duties.—It shall be the duty of the board of equalization and review to examine and review the tax lists of the county for the current year to the end that all taxable property shall be listed on the abstracts and tax records of the county and appraised according to the standard required by G.S. 105-283, and the board shall correct the abstracts and tax records to conform to the provisions of this Subchapter. In carrying out its responsibilities under this subdivision (g)(1), the board, on its own motion or on sufficient cause shown by any person, shall:

a. List, appraise, and assess any taxable real or personal property that has been omitted from the tax lists.

b. Correct all errors in the names of persons and in the description of properties subject to taxation.

c. Increase or reduce the appraised value of any property that, in the board's opinion, shall have been listed and appraised at a figure that is below or above the appraisal required by G.S. 105-283; however, the board shall not change the appraised value of any real property from that at which it was appraised for the preceding year

except in accordance with the terms of G.S. 105-286 and 105-287.

d. Cause to be done whatever else shall be necessary to make the lists and tax records comply with the provisions of this Subchapter.

e. Embody actions taken under the provisions of subdivisions (g)(1)a through (g)(1)d, above, in appropriate orders and have the orders entered in the minutes of the board.

f. Give written notice to the taxpayer at his last-known address in the event the board shall, by appropriate order, increase the appraisal of any property or list for taxation any property omitted from the tax lists under the provisions of this subdivision (g)(1).

(2) On request, the board of equalization and review shall hear any taxpayer who owns or controls property taxable in the county with respect to the listing or appraisal of his property or the property of others.

a. A request for a hearing under this subdivision (g)(2) shall be made in writing to or by personal appearance before the board prior to its adjournment. However, if the taxpayer requests review of a decision made by the board under the provisions of subdivision (g)(1), above, notice of which was mailed fewer than 15 days prior to the board's adjournment, the request for a hearing thereon may be made within 15 days after the notice of the board's decision was mailed.

b. Taxpayers may file separate or joint requests for hearings under the provisions of this subdivision (g)(2) at their election.

c. At a hearing under provisions of this subdivision (g)(2), the board, in addition to the powers it

may exercise under the provisions of subdivision (g)(3), below, shall hear any evidence offered by the appellant, the assessor, and other county officials that is pertinent to the decision of the appeal. Upon the request of an appellant, the board shall subpoena witnesses or documents if there is a reasonable basis for believing that the witnesses have or the documents contain information pertinent to the decision of the appeal.

d. On the basis of its decision after any hearing conducted under this subdivision (g)(2), the board shall adopt and have entered in its minutes an order reducing, increasing, or confirming the appraisal appealed or listing or removing from the tax lists the property whose omission or listing has been appealed. The board shall notify the appellant by mail as to the action taken on his appeal not later than 30 days after the board's adjournment.

(3) In the performance of its duties under subdivisions (g)(1) and (g)(2), above, the board of equalization and review may exercise the following powers:

a. It may appoint committees composed of its own members or other persons to assist it in making investigations necessary to its work. It may also employ expert appraisers in its discretion. The expense of the employment of committees or appraisers shall be borne by the county. The board may, in its discretion, require the taxpayer to reimburse the county for the cost of any appraisal by experts demanded by him if the appraisal does not result in material reduction of the valuation of the property appraised and if the appraisal is not subsequently reduced materially by the board or by the Department of Revenue.

b. The board, in its discretion, may examine any witnesses and documents. It may place any witnesses under oath administered by any member of the board. It may subpoena witnesses or documents on its own motion, and it must do so when a request is made under the provisions of subdivision (g)(2)c, above.

A subpoena issued by the board shall be signed by the chairman of the board, directed to the witness or to the person having custody of the document, and served by an officer authorized to serve subpoenas. Any person who willfully fails to appear or to produce documents in response to a subpoena or to testify when appearing in response to a subpoena shall be guilty of a misdemeanor and punished by a fine or by imprisonment or by both in the discretion of the court.

(4) Upon the completion of its other duties, the board may submit to the Department of Revenue a report outlining the quality of the reappraisal, any problems it encountered in the reappraisal process, the number of appeals submitted to the board and to the Property Tax Commission, the success rate of the appeals submitted, and the name of the firm that conducted the reappraisal. A copy of the report should be sent by the board to the firm that conducted the reappraisal.

TAX MANAGEMENT ASSOCIATES, INC.
BUSINESS PERSONAL PROPERTY AUDIT AGREEMENT
TMA AGREEMENT NO. B.P.

Between *CABARRUS*

(Herein after called "customer"), and Tax Management, Associates, Inc. (herein after called "TMA".) a corporation authorized to transact business in North Carolina and having its principal place of business in Charlotte, North Carolina.

GENERAL TERMS AND CONDITIONS

1. SERVICES

In accordance with the charges, terms and conditions contained in this agreement, TMA agrees to furnish NCGS (North Carolina General Statutes) audit services on a reasonable sample of the County's business personal property taxpayers. Audits will be performed in compliance with all statutes applicable within the N.C. Machinery Act, specifically; NCGS 105-283, Uniform Appraisal Standards; NCGS 105-317.1, Appraisal Elements for Reconciling to True Value; and NCGS 105-312, "Discovered Property" Procedures. Customer, shall receive two (2) copies of valuation report in the format agreed upon. Customer shall pay all charges due under the schedules in effect.

2. TERM OF AGREEMENT

This Agreement shall become effective from the date of its acceptance by TMA and shall remain in effect for an initial term of thirty six (36) months and shall continue in effect thereafter on a month-to-month basis cancellable by either party upon thirty (30) days written notice.

3. CHARGES

For services furnished by TMA under this Agreement, customer shall pay to TMA:

A. Schedule: 35% of taxes discovered including penalty.

B. Time: 25%—After notice of discovery to taxpayer
25%—After local appeal right is exhausted.
50%—At time of payment from taxpayer or by last day taxpayer can pay bill without interest, whichever occurs first.

All invoices shall be due and payable in full upon receipt. All amounts not paid within thirty (30) days after date of invoice are subject to a finance charge on the unpaid amount at the rate of one and one-half percent (1-1/2%) per month (annual percentage rate eighteen percent (18%)).

4. INDEMNIFICATION

Customer agrees that proprietary rights to the business personal property audit system shall remain with TMA and that customer will not sell or lease the system to any other person, company, or taxing jurisdiction or permit access to the system except for employees of the customer authorized to do so by TMA.

5. GENERAL

The Agreement will be governed by the laws of the State of North Carolina.

The customer acknowledges that he has read this agreement, understands it, and agrees to be bound by its terms and conditions.

6. NOTICES

Notices to be given or submitted by either party to the other, pursuant to this agreement, shall be sufficiently given or made in writing and sent by certified mail, postage prepaid.

ACCEPTED: TAX MANAGEMENT ASSOCIATES, INC.
Authorized Signature: /s/ Richard H. Cooke
Name: Richard H. Cooke

Title: President
Date: 5/4/88

ACCEPTED: CABARRUS COUNTY
Authorized Signature: /s/ Terry L. Rowland
Name: Terry L. Rowland
Title: Assessor
Date: May 3, 1988

CABARRUS COUNTY
Post Office Box 707
Concord, North Carolina 28026-0707

September 19, 1989

Mr. C.A. Saulo, Tax Manager
Philip Morris, Inc.
120 Park Avenue
New York, New York 10017

Dear Mr. Saulo:

Our auditors have advised they were unable to complete their audit when they visited your offices on August 24th in New York.

Over the past nine (9) months we believe our auditors have made every possible effort to secure the data and complete this audit in a formal way. However, only a limited amount of accounting records for fixed assets and inventory have been made available. Being the excellent corporate citizen you are, and our number one (1) taxpayer, this has caused us much concern.

Based on their report, which contains estimates due to lack of information, we propose to make the following discoveries pursuant to North Carolina General Statue [sic] 105-312:

Tax Year	M&E-F&F	CIP	Penalty
1989	$100,000,000	$25,000,000	10%
1988	100,000,000	25,000,000	20%
1987	100,000,000	25,000,000	30%
1986	100,000,000	25,000,000	40%
1985	100,000,000	25,000,000	50%
1984	100,000,000	25,000,000	60%
1983	100,000,000	25,000,000	60%

It is our desire to be fair and equitable with all taxpayers in Cabarrus County. We have conducted over one hundred

and fifty (150) audits within the past year with the proper records made available upon our request. We feel this County has been fair and patient with Philip Morris, Inc.

Our final request is any information or records that you possess that can change the above proposed assessment should be supplied to our auditors by Friday, October 6, 1989.

These values and penalties will become final unless we receive written exception thereto within thirty (30) days from the date of this letter.

Sincerely,

/s/ Terry L. Rowland
Terry L. Rowland
Assessor

Tax Management Associates, Inc. P.O. Box 10065
801 Oberlin Road, Suite 200
Raleigh, N.C. 27605-0065
Phone (919) 828-7660 or 825-7836

February 2, 1990

Mr. Terry L. Rowland, Assessor
Cabarrus County Tax Office
Post Office Box 707
Concord, North Carolina 28026-0707

RE: Philip Morris, Inc.
Property Tax Audit
(Preliminary Report to Assessor)

Dear Mr. Rowland:

We have reviewed the data which was furnished by the subject taxpayer relating to the audit of their Business Personal Property Tax Returns for the years 1983 thru 1989, inclusive.

With the information furnished, primarily a "Summary of Fixed Assets by Account, Cabarrus Manufacturing Facility as of December 31, 1988," together with the additional data supplied at the December 18, 1989 meeting, we make the following observations:

1. The "Summary of Fixed Assets by Account, Cabarrus Manufacturing Facility as of December 31, 1988," hereinafter referred to as "Asset Summary", has been verified with and tied to the supplemental schedules furnished at the December 18, 1989 meeting. The values for the assets listed were at full absorbed cost. Construction-in-Progress amounts were not included in the Asset Summary.

2. After making a comprehensive analysis of the Asset Summary it was evident that a substantial understatement existed in the various equipment values which were reported in the Business Property Tax Returns.

3. Inasmuch as the various accounts comprising the Asset Summary contained a mixture of assets that related to other accounts, a complete analysis was made of each account by year acquired. After proper classification of each account was made, the various accounts were adjusted or re-classed accordingly.

4. To support the explanation of re-classification of the Asset Summary, we are attaching the following schedules:

   Schedule "A": Represents the analysis of the Asset Summary based on the document as furnished by the Taxpayer.

   Schedule "B": Represents the analysis of the Asset Summary based on the document as furnished by the Taxpayer after making re-classification adjustments as indicated on Schedules B-305; B-310; B-315; B-320; B-325; B-330 and B-340.

5. Schedule "B" Sub-Accounts contain the re-class and adjusted cost values for the following categories:

   B-305 Land Improvements, account #305
   B-310 Buildings, account #310
   B-315 Building Equipment, account #315
   B-320 Machinery & Equipment, account #320
   B-325 Data Processing Equipment, account #325
   B-330 Furniture & Fixtures, account #330
   B-340 Transportation Equipment, account #340
   B-399 Explanation of re-class notes for the asset accounts itemized above.

6. Schedule "C":

   Represents the total personal property assessed tax values for 1984 thru 1989 for the categories of

assets which include Machinery & Equipment; Furniture and Fixtures; Building Equipment and Data Processing Equipment. It should be noted that the assessed tax value for the Railroad Spur Track which was assessed on the real property card has been added in this schedule since the cost for same has been re-classed from schedule B-305, Land Improvements to Schedule B-320, Machinery & Equipment.

7. Schedule "D":

Represents the total calculated tax values for the adjusted cost values for 1984 thru 1989 from Schedule "B" using the appropriate trending tables utilized by Cabarrus County for establishing tax values as published by the North Carolina Department of Revenue, Ad Valorem Tax Division. The tables used for each category are as follows:

B-15 Machinery & Equipment
E-10 Building Equipment
K-10 Furniture & Fixtures
L-6 Data Processing Equipment

Construction-in-progress is being assessed at 100% of the cost values inasmuch as this equipment has not been placed in service and therefore has not depreciated in value.

8. Schedule "D": (continued)

Also represents the summary of calculated tax values based on the adjusted cost values by category from Schedule "B" and detailed by Schedules B-315; B-320; B-325 and B-330. Construction-in-progress amounts were obtained from the financial statements furnished by the taxpayer. The total assessed values were obtained from the tax returns for each year as per detail from Schedule "C". The total variance in Schedule "D" represents the total

proposed assessment in accordance with North Carolina General Statutes 105-312.

9. Schedule "D" Sub-Accounts represent the detailed calculations by year acquired for each category using the appropriate trending schedules as follows:

   Schedule "D-1" (B-15) Machinery & Equipment
   Schedule "D-2" (E-10) Building Equipment
   Schedule "D-3" (K-10) Furniture & Fixtures
   Schedule "D-4" (L-6) Data Processing Equipment

   Construction-in-progress is being assessed at 100% of the cost values inasmuch as this equipment has not been placed in service and therefore has not depreciated in value.

   The above observations and schedules are presented to inform you of our process used in establishing the cost values of the various classes of personal property detailed in the Asset Summary furnished by the taxpayer. Since the issue of "Real vs Personal" was discussed at length in our December 1989 meeting, we feel that the proper classification of assets contained in the Asset Summary was extremely important. The net result was adjustments in the accounts as presented in the sub-"B" accounts.

During the examination of the Asset Summary, it became apparent that certain areas need to be addressed and resolved with further communication with the taxpayer and/or examination of the tax office records or establish the position of Cabarrus County in making any proposed assessment based on the information contained in this report. These areas are as follows:

1. Spur Track Re-class:

   It was observed from the Land Improvement Account that the total acquired cost of this property was $4,422,446, and acquired in 1982 and

1983. The real property card had a value of $482,944. We have re-classed these costs to account #320, Machinery & Equipment and depreciated accordingly. Credit for the tax value on this property as real, has been provided in the total assessed tax values as per Schedule "C".

2. Computer Software costs:

   This report contains 100% of the acquired costs for this property. You have, as we understand, historically excluded customized software and taxed only packaged software. Inasmuch as we are unable at this point to determine the nature of the software items in the Asset Summary, we have included all such property in this report.

3. Pollution Abatement Equipment:

   This report makes no provision for excluding this equipment inasmuch as no AV-12 Certifications are on file to properly exempt this property. The total amount included herein is $6,663,142 and was acquired over a four (4) year period, 1982 thru 1985.

4. Boiler & Boiler House:

   From our observation of the real property cards, no equipment or buildings for this facility are included with the real property values. We have not included these cost values in our personal property accounts but feel a more thorough examination should be made before any re-classification takes place.

5. Disposals of Equipment:

   The values for all personal property included in this report were obtained from the Asset Summary as of December 31, 1988. No attempt has

been made to add back any equipment that was disposed in any prior years.

6. Assumption:

We have assumed that the Asset Summary as of December 31, 1988 included all assets in Cabarrus County, with the exception of Construction-in-progress, and that they were there since the date acquired. (There appears to be a small amount of assets that were possibly transferred to the Cabarrus Plant from other locations. Although included in this report, we feel that the amount is not material and would more or less be offset by any disposals.)

7. Valuation of Data Processing Equipment:

We have used the L-6 trending schedule to value this equipment from 1984 thru 1989. This equipment was depreciated on an eight (8) year life through 1987 and changed to a six (6) year life in 1988. This was done with your approval to be consistent with the valuation and to correct the prior years in favor of the taxpayer.

8. Real Property:

We have included in our adjustments in Schedules B-310 and B-315 such items as silos, tanks, cooling tower, etc. which appear on the real property cards. Although they appear on the real property cards, there is a substantial difference in the acquired costs with relation to the assessed values. No additional assessment on real property is in this report. Some inspection at the facility on these items by the real estate department maybe necessary to determine if properly assessed.

9. 1983 Tax Year:

No additional assessment is made in this report

for this Tax Year inasmuch as the amounts reported by the taxpayer included substantially all the assets as of December 31, 1982.

10. Construction in Progress:

The amounts made available by the taxpayer for this category did not reveal whether it was Real or Personal Property. Pending receipt of a more descriptive analysis of this account, we have included the entire amount as Personal Property. The basis for this decision is that during the period covered by this audit, the real property accounts increased only $2,850,000. The equipment accounts increased $95,087,000. The total amount of CIP for the tax years included in this report total $88,893,000. For this reason we are including the CIP as personal property pending receipt of additional data from taxpayer.

Based on the examination of the data received and our analysis as per the attached schedules reflecting our approach to establishing the tax values herein, we recommend that the proposed discovery dated December 20, 1989 be amended as follows:

Tax Year	*Amount	Penalty
1989	$109,517,118	10%
1988	137,871,145	20%
1987	157,748,698	30%
1986	174,244,015	40%
1985	193,344,955	50%
1984	203,095,576	60%

*See Schedule "D" for detail

The above amounts represent the depreciated tax values where applicable. I am enclosing herewith fifteen (15) copies of this report for your convenience.

Please advise me of any revisions that you feel need to be made that could change this report. If I can be of any assistance, please call me at (919) 828-7660.

Very truly yours,

/s/ John M. White
John M. White
Chief Auditor

[Accompanying Schedules Omitted]

Hunton & Williams
100 Park Avenue
New York, New York 10017

May 17, 1990

Mr. Terry L. Rowland, Assessor
Cabarrus County
Cabarrus County Courthouse
P.O. Box 707
Concord, N.C. 28026-0707

Re: Philip Morris U.S.A.
Cabarrus County Property Taxes

Dear Mr. Rowland:

In behalf of Philip Morris U.S.A. ("Philip Morris") and in accordance with the provisions of Section 105-312(d), North Carolina General Statutes ("G.S."), I am enclosing the formal request by Philip Morris for review by the Board of Equalization and Review of the final decision dated May 3, 1990.

In light of (i) the conferences attended by you, me, representatives of Tax Management Associates, Inc. ("Tax Management"), representatives of Cabarrus County and representatives of Philip Morris on December 18 and December 19, 1989, March 27, 1990 and May 16, 1990, (ii) the inordinate time and effort expended with respect to the audit and (iii) the substantial expenses incurred by Philip Morris to satisfy the demands of Tax Management during the arduous course of the audit, I am taking the liberty of summarizing our beliefs with respect to this case based on the facts and circumstances we have encountered, examined and evaluated.

We believe that Philip Morris prepared and submitted its North Carolina Personal Property Tax Returns (the "Returns", for the years 1983 through 1989 in substantial compliance with the applicable laws of North Carolina. We further believe that Tax Management utilized appraisal techniques which are in direct violation of the North Car-

olina appraisal and assessment property tax laws. The dollar discrepancies between the amounts reported by Philip Morris on the Returns and the amounts asserted by Tax Management in its proposed discovery as amended in the purported final decision dated May 8, 1990 are essentially attributable to the following two factors:

1. Philip Morris appraised or valued the personal property reported on the Returns at its market value (the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller) under Section 105-283, G.S. Tax Management did not appraise or value the property under Section 105-283, G.S. (or any other North Carolina statute) but merely asserted the sum of a) the basis of the property as finally determined for Federal investment tax credit purposes under Section 48 of the Internal Revenue Code (which includes hard costs (purchase price of the property) and any indirect costs however remotely connected to the property and regardless of whether such costs have any affect on the market value of the property), plus b) "book interest", as the value of the personal property in question for North Carolina personal property tax purposes.

2. Substantially all of the building equipment reflected on the books of Philip Morris was properly included by you, as the Assessor, in the real property appraisals and taxed as real property during the years in question. Accordingly, Philip Morris reported on the Returns only those building and equipment assets which Philip Morris verily believed were not included in the real property appraisal. The market value of such building equipment was $4,847,102. On the other hand, Tax Management "discovered" building and equipment assets in the amount of $126,118,925 (this amount also represents the basis of such property as finally determined for Federal investment tax purposes plus book interest and not market value) notwithstanding that substantially all of such building and equipment assets were in fact taxed as real property. In

April, 1990, Strategis Asset Valuation and Management (Philip Morris' appraisal firm) made an extensive examination of the building and equipment asset account and determined that items in this account with a market value of $4,149,400 constituted personal property which should have been reported on the Returns. The appraisal firm also determined that the items of building and equipment reported by Philip Morris on the Returns with a market value of $4,847,102 should not have been reported because they were properly included in the real property appraisals and taxed as real property.

The differences between the amounts reflected on the Returns and the amounts asserted by Tax Management in its "discovery" may be summarized by accounts as follows:

I. Machinery and Equipment

Market Value Per Returns	Federal Investment Tax Credit Value Per Tax Management
$174,680,332	$239,296,468

The difference ($64,616,136) between the market value as shown on the Returns and the Federal investment tax credit value as modified (to include "book interest") and adopted by Tax Management represents book interest in the amount of $36,734,750 and soft costs (indirect costs) which we fully discussed at the May 16, 1990 conference and which we believe do not enhance the value of the assets to which they were allocated for Federal investment tax credit purposes.

II. Building Equipment

Market Value Per Returns	Federal Investment Tax Credit Value Per Tax Management
$4,847,102	$126,118,925

The difference ($121,271,823) between the market value

as shown on the Returns and the Federal investment tax credit value as modified (to include "book interest") and adopted by Tax Management represents book interest in the amount of $29,769,879 and building and equipment assets included in the real property appraisals of the Assessor and subjected to real property taxes during the years under audit.

III. Furniture and Fixtures

Market Value Per Returns	Federal Investment Tax Credit Value Per Tax Management
$4,630,105	$4,724,674

The Federal investment tax credit value as modified (to include "book interest") and adopted by Tax Management includes book interest in the amount of $717,805.

IV. Data Processing Equipment

Market Value Per Returns	Federal Investment Tax Credit Value Per Tax Management
$4,509,039	$5,678,929

The difference ($1,169,890) between the market value as shown on the Returns and the Federal investment tax credit value as modified (to include "book interest") and adopted by Tax Management includes book interest in the amount of $734,839.

The above analysis clearly indicates that:

1. Tax Management is including in its so-called "values" of machinery and equipment (and building equipment) book interest, soft cost and other indirect costs, "booked" by Philip Morris, in the case of: (i) book interest, to comply with generally accepted accounting principles in determining the earnings of Philip Morris, and (ii) soft costs and other indirect costs, for Federal investment tax credit pur-

poses, regardless of the fact that such costs do not enhance the market value of the assets. A flagrant example of this is allocated book interest which not only does not enhance the fair market value of the asset to which it was allocated but is specifically excluded by the North Carolina Department of Revenue as an item to be considered in appraising business personal property.

2. Tax Management is subjecting building and equipment assets (which are classified as such solely for Federal investment tax credit purposes) to personal property taxes even though such assets were clearly in the real property appraisals of the Assessor and subjected to real property taxes. It should be especially noted that Tax Management is devoid of knowledge in the real property appraisal field and is totally indifferent to the "double taxation" being imposed upon Philip Morris.

At the meeting held in your office on May 16, 1990, Tax Management proposed to add the following Federal investment tax credit cost items to the market values of the machinery and equipment as shown on the Returns:

Machinery Installation	($5,969,376)
Stacker Crane Installation	(2,818,165)
Carton/Case Installation	(178,745)
JES Eng. Fees	(8,489,688)
P.M. Overhead	(2,628,210)
CTB-Eng. Fees	(499,800)

We agreed to the increase in the market values of machinery and equipment as shown on the Returns with respect to installation costs and are reviewing the JES Eng. Fees, P.M. Overhead and CTB-Eng. Fees to determine the extent, if any, to which these costs are included in the building accounts and real property appraisals.

The Tax Management allegations of omissions by Philip Morris with respect to the building and equipment assets are staggering at best. In order to address the civil nature

of these allegations we have agreed to a meeting in your offices to be held on May 24, 1990 at 9:00 A.M. and to be attended by you, me and Messrs. John Paterson, William McGee, Dennis Parker and John White. I believe that at the conclusion of this meeting all parties should be better situated to assess and assert their positions and, if necessary, pursue their grievances.

Sincerely,

/s/ James W. Shea
James W. Shea

JWS:cas
Encls.

SUPREME COURT OF NORTH CAROLINA

No. 49PA93

In the Matter of:

The Appeal of Philip Morris U.S.A. from the decision of the Cabarrus County Board of Equalization and Review for personal property taxes years 1984-1989

Excerpts from
NEW BRIEF OF APPELLEE
PHILIP MORRIS U.S.A.

FILED
1993 MAY 17
From the Property Tax Commission
90-PTC-426

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* * *

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT THIS CONTINGENT FEE CONTRACT FOR A TAX AUDITOR'S SERVICES VIOLATES PUBLIC POLICY?

II. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT THE DISCOVERY OF PHILIP MORRIS U.S.A.'S BUSINESS PERSONAL PROPERTY IS VOID?

III. IS A PROPERTY TAX DISCOVERY BASED ON A CONTINGENT FEE AUDIT CONTRACT UNCONSTITUTIONAL UNDER THE UNITED STATES AND NORTH CAROLINA CONSTITUTIONS?

IV. IS A PROPERTY TAX DISCOVERY BASED ON A CONTINGENT FEE AUDIT CONTRACT NULL AND VOID SINCE A NORTH CAROLINA COUNTY AND ITS TAX ASSESSOR HAVE NO AUTHORITY TO ENTER INTO SUCH A CONTRACT, CONDUCT SUCH AN AUDIT AND RENDER A DISCOVERY BASED ON SUCH AN AUDIT?

* * *

III. CONSTITUTIONAL AND GOVERNMENTAL AUTHORITY PRINCIPLES PROVIDE ADDITIONAL GROUNDS TO VOID THE DISCOVERY.

The Agreement and resulting discovery clearly violate public policy. Furthermore, Philip Morris has properly preserved two additional issues, first by raising them before the Property Tax Commission and then by appealing and cross-appealing them to the Court of Appeals: (i) The discovery based on the contingent fee audit is unconstitutional and (ii) the discovery is void as ultra vires the authority of Cabarrus. These issues provide additional grounds to support the decision of the Court of Appeals. App. R. 10(d) and 28(c) permit Philip Morris to raise these issues. The violation of these fundamental principles supports that the discovery is not only void as against public policy, but is void as a matter of law.

A. THE PROPERTY TAX DISCOVERY BASED ON A CONTINGENT FEE AUDIT CONTRACT IS UNCONSTITUTIONAL UNDER THE UNITED STATES AND NORTH CAROLINA CONSTITUTIONS.

ASSIGNMENT AND CROSS ASSIGNMENT OF ERROR NUMBERS 1 2, 3.

(R pp. 276-77)

EXCEPTION NUMBERS 1, 2 and 3.

(R pp. 262-66, 269-72)

TMA's interest in the audit of Philip Morris was to have Cabarrus issue as high a discovery as possible. This bias infected the entire taxation process depriving Philip Morris of its right to due process of law and to the synonymous North Carolina "law of the land." U.S. Const. amend. XIV; N.C. Const. art. I, § 19.

* * * *